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Supreme Court, U. S.
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IN THE SUPREME COURT OF THE

UNITED STATES

No. 72-1089

JOHN ALLAN LONDON,

Petitioner,

vs.

L.N. PATTERSON, Superintendent, Devel Vocational Institution,

Respondent

Petition for Writ of Certiorari to the

Court of Appeals for the Ninth Circuit

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IN THE SUPREME COURT OF THE

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No.

JOHN ALLAN LONDON,

Petitioner,

vs.

L. N. PATTERSON, Superintendent, Devel Vocational Institution,

Respondent

Petition for Writ of Certiorari to the

Court of Appeals for the Ninth Circuit

John Allan London, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on

July 10, 1972.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (printed in Appendix A hereto, infra, pursuant to the provisions of Rule 23(i) of this Court) is reported at 463 F. 2d 95. (July 10, 1972).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment in this case affirming the denial by the United States District Court for the Northern District of California of petitioner's application for a writ of habeas corpus. Thereafter, a petition for rehearing by the Court en banc was filed by petitioner on September 17, 1972, and denied by said Court on October 12, 1972. On application of petitioner said Court stayed the issuance of its mandate under Rule 41a of the Federal Rules of Appellate

Procedures pursuant to the provisions of Rule 41b of the same rules, pending the filing, consideration and disposition by this Court of a petition for writ of certiorari, providing such petition be filed on or before November 18, 1972. An application for extension of the Order Staying Issuance of Mandate was denied November 24, 1972. A motion for reconsideration of that denial was denied December 26, 1972.

Petitioner invokes jurisdiction of this Court under the provisions of 28 U.S.C. §§ 1254(1) and 1651(a) and U. S. Sup. Ct. Rule 19(b), 28 U.S.C.

QUESTIONS PRESENTED FOR REVIEW

1. Is a criminal defendant s privilege against self-incrimination, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, violated by the introduction against him as part of the prosecution's case in-

chief in a state criminal prosecution of his testimony on deposition in a prior civil action against him, where the defendant exercises his right not to testify at the criminal trial?

2. Should a defendant in a state prosecution be deemed to have waived his privilege against self-incrimination by testifying on deposition in an unrelated civil action where at the time of the deposition there were no criminal charges pending against him, he had no apprehension whatsoever of the possibility of self-incrimination, and the civil action was frivolous?

3. Does it violate a defendant's Fifth Amendment privilege to introduce against him as part of the prosecution's case in-chief in a state criminal proceeding the defendant's testimony on deposition in a prior civil action, where at the time of the deposition refusal to testify on deposition would have put the defendant in substantial

jeopardy of having a $740,000 judgment entered against him?

4. Are the rights of a defendant under the Fifth and Fourteenth Amendments violated by the introduction against him as part of the prosecution's case-in-chief in a state criminal prosecution, of his testimony on deposition in a prior civil action, where said deposition was introduced solely to impeach it, and such impeachment was accomplished by false testimony?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V:

(In pertinent part) No person...shall be compelled in any criminal case to be a witness against himself,...

United States Constitution, Amendment XIV:

(In pertinent part) ...(N)or shall any State deprive any person of life, liberty or property, without due process of law;...

28 U.S.C. §2243 (In pertinent part)

§2243. Issuance of writ; return; hearing; decision

...When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or person detained may, under oath, deny any of the facts set forth in the

return or allege any other material facts..

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

STATEMENT OF THE CASE

1. Proceedings below.

On June 16, 1966 an indictment was filed in the Contra Costa County (California) Superior Court charging petitioner, John A. London, in two counts with violation of California Penal Code section 470, (forgery of a promissory note and an order to pay funds in the amount of $50,000 on the Concord National Bank dated December 21, 1964) and in one count with violation of Penal Code section 484 (grand theft of said amount from said bank by means of the forgeries alleged). (CT 1-4)

Following his arraignment on June 21, 1966 and the denial of a motion to dismiss the indictments, petitioner entered a plea of not guilty to

all three counts on August 15, 1966. (CT 5-8, 45) On October 25-28 and October 31, 1966, petitioner was tried by a jury, which trial resulted in the discharge of the jury as unable to agree upon a verdict. (CT 9-19).

On December 13-16, 1966, petitioner was retried before a jury. (CT 21-32) Substantially the same evidence was offered by the prosecution as was offered in the first trial, including the introduction of a copy of a portion of testimony taken on March 24, 1966 on deposition of the petitioner in a civil action filed in Seattle, Washington. (RT 175-9 St. Ex. 16) On December 16, 1966 the jury found appellant guilty as charged on all three counts (CT 29-35). Judgment was entered on May 8, 1967, and petitioner was sentenced to state prison for six months to fourteen years. (CT 45-53)

An appeal alleging erroneous jury instruc-

tions was taken to the District Court of Appeals, First Appellate District, which affirmed petitioner's conviction on September 27, 1968. (Record on appeal 17, 24-9 (hereafter RA)). The Supreme Court of California denied a hearing on November 20, 1968. (RA 17)

Petitioner then applied to the California Supreme Court for a writ of habeas corpus alleging inter alia the Fifth and Fourteenth Amendment violations urged here The petitioner was denied without hearing February 26, 1969. (RA 78, 98-107)

Petitioner then filed his petition for a writ of habeas corpus in the United States District Court for the Eastern District of California on March 6, 1969 (RA 2-11), which was then transferred to the United States District Court for the Northern District of California (RA 1), on the grounds herein urged (RA 8-11). Jurisdiction of

the District Court was by virtue of 28 USC §2241 (a). An order to show cause was issued (RA 14) and the petition was considered without a hearing on the basis of the return (RA 16-55) and amended return (RA 57-8) and petitioner's traverse (RA 66-116) and amended traverse (RA 117-20). The District Court denied the petition on May 1, 1970 in an unpublished order (RA 121-3, Appendix B herein).

On June 23, 1970, appellant filed a Notice of Appeal on June 23, 1970 (RA 124) and the District Court issued its certification of probable cause on September 17, 1970 (RA 127).

The Court of Appeals for the Ninth Circuit affirmed the District Court's denial of the writ on July 10, 1972 in an opinion published at 463 F. 2d 95 (Appendix A herein).

2. Statement of Facts

Petitioner John A. London met Mrs. Muriel Geddes sometime in August of 1960, while Mrs. Geddes and her daughter were vacationing in California (RT 180). Over the course of the next few years there were social visits between the two families and increasingly business dealings between petitioner and Mrs. Geddes. (RT 180-82) In April of 1963, Mrs. Geddes, on the advice of petitioner invested in the Holiday Lodge in Reno, and in the fall of 1964 petitioner left Seattle, Washington to come to Reno and act as manager of the lodge. (RT 183-90) In this capacity petitioner took care of substantially all of the business of the lodge. (RT 189) He signed all necessary papers and made arrangements for everything from entertainment to financing. (RT 191-2, 212-15, 255-9) Mrs. Geddes considered petitioner to be her "financial advisor", and stated that he had authority to act (including signing

papers) in her behalf. (Rt 257, 259)

Mr. Philip Palmer, a San Francisco area businessman, testified that he met petitioner in October of 1964 while vacationing at the lodge. (RT 142) During the course of about a six-week stay, he engaged in conversations with petitioner about refinancing the lodge. (RT 143) Petitioner and other officers of the lodge also discussed these refinancing plans with Lyle Turner, a San Francisco attorney and associate of Mr. Palmer (RT 43-45) During these meetings Mr. Turner acquired a financial statement of Mrs. Geddes. (RT 45, St. Ex. 1-A, 1-B) The refinancing never went through. (RT 45)

In December of 1964, Palmer, having been requested by Lyle Turner to try to find someone who could qualify for an unsecured $50,000 bank loan, contacted petitioner to see if Mrs. Geddes would be interested in obtaining such a

loan for investment in Metro/Urban Corporation, a group organized to bid on an urban redevelopment project to be undertaken in Oakland (Lyle Turner was attorney for Metro/Urban) (RT 46, 52, 144). Petitioner referred Palmer to Mrs. Geddes' attorney, who told Palmer that such an investment was not that Mrs. Geddes' "cup of tea" (RT 145-6). Thereupon Palmer again contacted petitioner, who indicated that as Mrs. Geddes' financial advisor he would see if such an arrangement might be made. (RT 145) A meeting was held around December 1, 1964, between Palmer, a Mr. Haynes, Mrs. Geddes, and petitioner for the purpose of acquainting Mrs. Geddes and petitioner with the Metro/Urban project (RT 145-6).

In further pursuance of financing for Metro/Urban a group of meetings took place on December 15, 1964. According to Mr. Palmer there was first a meeting in the morning at the Metro/Urban office, at

which petitioner and Mrs. Geddes and numerous Metro/Urban officials and functionaries were present (RT 147-8). Then most of those present moved to the Commonwealth National Bank for the purpose of attempting to get a loan. (RT 46-7, 146-8, 193-4) Both petitioner and Mrs. Geddes participated in this meeting. (RT 46) The bank ultimately rejected this loan application. (RT 46)

The meeting then moved back to the Metro/Urban office, where further discussions ensued. Here Mr. Turner drew up a continuing guarantee by Mrs. Geddes of a $50,000 unsecured loan to Metro/Urban to be obtained if possible and an agreement giving Mrs. Geddes in exchange an option to purchase Metro/Urban stock. (RT 47-9; St. Ex. 5-A, 5-B) Though Mrs. Geddes took part in the meeting at the Metro/Urban office and was present during the dictation of these agreements, she left the meeting

prior to their completion (RT 50-2), and arrangements were made for Mr. Palmer to bring the documents to petitioner and Mrs. Geddes at their hotel later on. (RT 149-50) Throughout these dealings Mrs. Geddes was aware of the nature of the negotiations and her position in relation to them (RT 50, 193-5, 226-8).

Mrs. Geddes testified that as she was leaving the building housing the Metro/Urban office, she was called aside by petitioner who told her that he had had an opportunity to speak with the contractor who wasn't as financially sound as he appeared to be, and that it did'nt seem to be a very good deal. (RT 195-6) Mrs. Geddes then went shopping. (RT 196-7)

Later that afternoon (December 15, 1964), Mr. Palmer went to the Saint Francis Hotel with Mr. Haynes to obtain signatures on some documents which he recalled as resembling the loan guarantee

and stock option drawn up earlier by Mr. Turner. They met Mr. London in the cocktail lounge and were joined shortly by Mrs. Geddes. Petitioner and Mrs. Geddes excused themselves and went to another table, returning after a short while with the documents signed. Since petitioner and Mrs. Geddes had their backs to him, Mr. Palmer did not see who signed the documents. (RT 149-52)

Mrs. Geddes testified that she could not remember exactly what was said at the other table, but that it generally concerned the Metro/Urban deal. (RT 230-31) She also testified that she did not recall signing anything at the hotel (RT 205), and that the signatures on the guarantee agreement and the stock option were not hers. (RT 200-201, St.Ex. 5-A, 5-B)

The meeting at the hotel was pertinent in one other respect. The prosecution introduced a writing dated

December 15, 1964 appearing to be a power of attorney to petitioner to engage in any and all transactions and sign any and all necessary documents in Mrs. Geddes' behalf in connection with the Metro/Urban negotiations. (RT 201; St.Ex. 12) Mrs. Geddes denied on direct examination that she had signed such a document, while affirming that the signature was indeed hers. (RT 201) On cross-examination, however, she stated that there was a "possibility" that she signed a paper at the hotel. (RT 234) Transcripts of Mrs. Geddes' testimony at a civil trial, at a deposition, and from the prior trial of petitioner, each containing reference to signing a piece of paper at the hotel were read to her, and she affirmed that the answers read were hers (RT 231-239). Among these answers was a statement on deposition to the effect that she

remembered at the time feeling "why should I sign if it was no good? I must have been out of my mind," (RT 234), and another from petitioner's first trial that she could not say that the power of attorney (St.Ex. 12) was not the paper she had signed at the hotel (RT 237).

After the meeting at the hotel, Mr. Palmer took the signed documents back to the Metro/Urban office (RT 152-3).

On December 21, 1962, Turner and Palmer went to the Concord National Bank to arrange a loan of $50,000. (RT 11, 53) Richard J. Fase, a vice-president of the bank, testified that Turner was introduced to him by a Mr. Roper as Mrs. Geddes' attorney (RT 12, 25, 28), and that Turner said he represented Mrs. Geddes in seeking the loan to refinance the Holiday Lodge in Reno and that Metro/Urban was assisting in this refinancing (RT 11-12, 21-22, 27).

Turner, on the other hand, testified that he was not introduced to Fase by Roper, (RT 75) that he never represented Mrs. Geddes and never told Fase that he did (RT 68, 75), and that he told Fase tha loan was for operating capitol for Metro/Urban (RT 57, 68).

By either account Turner also gave Fase the copy of Mrs. Geddes' financial statement and list of stocks which he had acquired in an earlier meeting concerning refinancing Holiday Lodge (RT 11-13, 45; St.Ex. 1-A, 1-B). He told Fase to call a Mr. Merrill at the First National City Bank in New York to verify the financial statement and to mention petitioner's name if he had trouble getting the necessary information (RT 14). After doing so, Fase agreed to approve the loan and had prepared the promissory note and order to pay funds which petitioner was charged with forging.

(RT 15; St.Ex. 2-A, 2-B) The address and signature spaces were left blank on both documents as was the payee on the order to pay (per Turner's instructions), and Fase gave the documents to Turner (RT 16).

On the evening of December 21, 1974, Fred Babo (an officer of Metro/Urban) drove Palmer and Turner to the San Francisco International Airport to meet petitioner and Mrs. Geddes who were arriving from Seattle. (RT 59, 154) When they met in the airport, Turner gave the note, order to pay and signature cards to petitioner. (RT 59) At this point Mrs. Geddes was standing apart from them, talking to Palmer (RT 59, 154). It was arranged that Palmer call petitioner at Mrs. Geddes' house in about twenty minutes, and petitioner and Mrs. Geddes were driven to her car (RT 60, 155). Palmer called from a restaurant, petitioner told him that "everything was signed and approved," and petitioner arrived

at the restaurant in another fifteen minutes to half an hour (RT 155). At this time petitioner gave Turner the note and order to pay completed and signed as related below and arranged to give Palmer the signature cards (which he had forgotten) the next day (RT 61, 155-6). He did so and, explaining that he and Mrs. Geddes had to return to Reno, asked Palmer to take them to the bank. (RT 156-7; St.Ex. 4)

Turner went to the bank on December 22, 1964 and returned the documents. Each bore the address 940 Stoney Court and signatures resembling Mrs. Geddes' signature on her financial statement and which Turner assured Fase were genuine (RT 16-17, 30). The payees on the order to pay were listed as Lyle Turner, Fred Babo, Phil Palmer and Metro/Urban (RT 17, 61-2). Turner also gave Fase a letter which he had drafted signed by the named payees directing him

to open three accounts at the bank, one in Mrs. Geddes' name and one in the name of Holiday Lodge each of $5,000, and one in the name of Metro/Urban in the amount of $40,000 (RT 18, 62; St.Ex. 3). The accounts were accordingly established. (RT 19) Fase stated that up to this point he had never seen nor spoken with petitioner or Mrs. Geddes and was acting solely on Turner's representations (RT 24, 27-8).

The Metro/Urban account was dissipated quickly, and the two $5,000 accounts, which were never drawn upon, were eventually offset by the bank and reapplied to the $50,000 loan when the note became past due (RT 19). Turner, who was an officer of Metro/Urban as well as its attorney, was a co-signer on some of the checks drawn on the Metro/Urban account (RT 69). He stated that of the $40,000, $5,000 was paid to him as attorney's fees,

and $5,000 each went to Palmer and Babo (RT 69). He also received between $1,000 and $1,500 of Palmer's draws as a "loan" which he had not paid back (RT 70). He testified that none of the $40,000 went to petitioner, and that petitioner had never raised any question of receiving compensation out of these transactions (RT 70-1).

Mrs. Geddes testified that toward the end of January 1965, she received a bankbook showing the $5,000 account in her name (RT 208). She asked petitioner about it, and he replied that it was a mistake and that Mr. Babo ought to have taken care of it (RT 209). Petitioner also told her when asked that she had not signed anything that would involve her in the deal (RT 209). Another statement came in February 1965, and again petitioner told her that it was a mistake and that he would straighten it

out (RT 209).

In April of 1965 Mrs. Geddes received a demand for payment of the $50,000 note (RT 209). Edward Hogarty, assistant vice-president of the bank, testified that he spoke with Mrs. Geddes on April 19, and that she said she hadn't signed the note because petitioner had told her not to go into the deal (RT 133-4). Petitioner confirmed this in a conversation later that day (RT 135). In a conversation with Hogarty the next day, petitioner stated that "if there was any wrongdoing in this matter that he thought it was either Mr. Palmer or Mr. Babo." (RT 135)

Turner testified that about the middle of April petitioner indicated to him that he felt it might be Mr. Palmer who had signed the note. He said that he replied that this was impossible as petitioner had given him the documents and Mr. Palmer had never had

them. (RT 66-7)

A few days later a meeting was held in Turner's office at Palmer's request with petitioner, Mrs. Geddes, Babo, Palmer, Turner, a Mr. Wood and Donald Westerman, Vice-President and Cashier of the bank, present (RT 64, 122, 158-9, 210). Mr. Westerman attended the meeting to obtain either payment of the note or an affidavit of forgery signed by Mrs. Geddes. (RT 122) At this meeting Mrs. Geddes said that she did not remember signing the note and that the signature on it did not look like hers (RT 65, 159). Petitioner also said that the note was not Mrs. Geddes' and that she had not agreed to go into the transaction (RT 65, 124). Petitioner suggested that a new note could be signed by all the concerned parties, but Babo vetoed this idea (RT 65-6, 160).

Petitioner then requested a separate meeting with Mr. Westerman and Mrs. Geddes,

and they went to a room provided by Turner for that purpose (RT 66, 125). Here petitioner stated that Mrs. Geddes would sign the affidavit of forgery, but that he didn't want to have her sign it there, as he didn't trust the others involved (RT 125). Mrs. Geddes ultimately signed the affidavit before a notary and sent it in to the bank (RT 125-6, 211; St.Ex. 13).

Police Inspector Vincent H. Granburg, who investigated the matter, testified that he went to Reno to talk to petitioner and Mrs. Geddes on April 24, 1965 (RT 168-9). He stated that when asked to fill out a handwriting exemplar, petitioner started to do so, but changed his mind, stating he should contact his attorney first, and did not complete the exemplar (RT 172). Directly after this testimony the prosecution introduced part of a deposition of petitioner in a

Washington civil action for $740,000 brought against him by Mrs. Geddes (RT 175-9; St.Ex. 16). Among other matters petitioner stated in this deposition that he had given a handwriting exemplar to the police (RT 178). It is Inspector Granburg's testimony and the introduction of this deposition which are complained of in this petition. (Subsequent to his conviction petitioner acquired a copy of his handwriting exemplar witnessed by Granburg and dated April 24, 1965, and this copy was included in petitioner's Traverse to the Return of his Petition for a Writ of Habeas Corpus to the District Court (HA 113-4; Ex .10).)

Suzanne Turner, Mrs. Geddes's daughter (and no relation to Lyle Turner) testified that she had know appellant for six years, and she was familiar with the handwriting of both petitioner London and Mrs. Geddes, and that the simulated

signature of Muriel T. Geddes on the note and order to pay were written by petitioner (RT 77-81). She also testified that it was petitioner who had written the simulated signature "Muriel T. Geddes" on several other documents shown to her, and that these concerned transactions involving the lodge which were known to and acquiesed in by her mother, but that she did not specifically know if Mrs. Geddes had authorized these signatures (RT 96-105). In this connection she testified that petitioner had a "free hand" and "complete management" of the lodge (RT 97, 105).

She also testified that shortly after petitioner was indicted he had called her to meet him at the San Francisco Airport (RT 54-5). There, petitioner told her that he had signed the "bank draft" for the Concord National Bank, saying that if the

deal went through, Mrs. Geddes would make a profit, and if the deal did not go through, she could claim the note was invalid as she had not gone to the bank to sign it (RT 85).

Sherwood Morrill, an expert in questioned documents, testified that in his opinion the note, the order to pay, the signature cards, and the letter of guarantee and the option agreement dated December 14, 1964, were not signed by Mrs. Geddes, but represented simulated copies of her signature (RT 109-11). Because a person so simulating a signature will not use his or her normal writing characteristics, Mr. Morrill testified that he could not tell who had simulated Mrs. Geddes' signature (RT 107-112). It was his opinion that the writing of the 940 Stoney Court address on the note, and the printing of the payees on the order

to pay had been executed by petitioner (RT 109-110). It was also his opinion that the power of attorney referred to above and dated December 15, 1964 (St.Ex. 12) was in fact signed by Mrs. Geddes, and that nothing in the body of the document indicated any alteration (RT 113-18).

The last prosecution witness was Mrs. Geddes (RT 179-266). Significant portions of her testimony have been cited above and will not be repeated.

The defense called a Mr. Duane Brennaman, Vice-President and Cashier of the Peninsula Bank who stated that he was visited by petitioner and Mr. Babo on December 17, 1964, to inquire about a loan to Metro/Urban (RT 267). He said that he had called Mrs. Geddes to discuss the loan on December 18, and that she did not indicate that she was not interested in such a loan

(RT 270-1), though her responses were limited (RT 271).

Clarence Crandall, a plumbing contractor who was part of a group which eventually sold the assets of Holiday Lodge to Mrs. Geddes (RT 279), testified that Mrs. Geddes earlier had loaned money to the lodge and, in return, had received a deed of trust on a building owned by Mr. Crandall (RT 290-91). On January 11, 1965, he made a trip to the Holiday Lodge to obtain a reconveyance on a deed of trust, as the debt had been discharged (RT 279). He gave the request for reconveyance to petitioner and about half an hour later petitioner and Mrs. Geddes returned with the request for reconveyance signed (RT 280). When he asked Mrs. Geddes if it was her signature, she said yes. However, appellant interrupted and said that he had signed the reconveyance because he had signed all earlier documents (RT 281).

When Mr. Crandall then asked if he would have trouble with the reconveyance, Mrs. Geddes spoke up and said, "Well couldn't we give him a paper, like we gave for the bank in Concord?" (RT 281).

Laura London, petitioner's daughter, stated that she was at the lodge when Inspector Granburg came, and that after the visit Mrs. Geddes was very upset and said, "That darn policeman from the Concord Bank," and that "I wish we'd never gotten into this thing." (RT 301).

On rebuttal Mrs. Geddes testified that it was not her signature on the request for reconveyance, and that the conversation to which Crandall had testified did not take place (RT 302-5). She also did not recall the conversation to which Laura London had testified (RT 309-10).

On these basic facts, petitioner was tried and convicted.

REASONS COMPELLING ALLOWANCE OF THE WRIT

1. Admission against the petitioner in the California criminal trial of his deposition taken in an unrelated and frivolous Washington civil action violates his right to silence under the Fifth and Fourteenth Amendments.

A. Self-incriminating testimony is inadmissible against a criminal defendant absent knowing waiver of his right to silence.

The testimony given by the petitioner in the Washington deposition was admissible in the California criminal trial, if at all, as containing admissions of a party. Since this testimony was offered against petitioner as part of the prosecution's case in chief, petitioner's privilege against self-incrimination would bar the introduction of the deposition unless it could be shown that petitioner had waived

this privilege. Miranda v. Arizona, 384 U.S. 436, 476, 16 L.Ed.2d 694, 724, 86 S.Ct. 1602 (1966). See Harris v. New York, 401 U.S. 222, 224, 28 L.Ed.2d 1, 4, 91 S.Ct. 643 (1971); Opper v. U.S., 348 U.S. 84, 99 L.Ed. 101, 75 S.Ct. 158 (1954). In the area of constitutional protections it has long been held that waiver means "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 82 L.Ed. 1461, 1467, 58 S.Ct. 1019 (1937) (Emphasis added); Miranda v. Arizona, supra., at 467-9, L.Ed. at 720.

B. Petitioner did not knowingly waive his right to silence by the mere fact of his deposition testimony.

The District Court did not make clear its basis for finding that defendant knowingly waived his right to silence in giving his deposition testimony. Rather,

it merely pointed to the fact that the petitioner was represented by counsel and added the conclusory statement that he "voluntarily" testified. (See Appendix B, infra) Apparently the court was asserting that the very fact of petitioner's failure to assert his privilege evidenced a waiver, citing United States v. Wolfson, 204 F.Supp. 267, 273 (D. Del. 1968).

This Court of Appeals simplified the position somewhat. It stated that since petitioner was being sued for $740,000 on grounds amounting to various types of fraud, and had retained counsel, he "could not have been blithely ignorant of possible criminal involvement." Appendix A infra, 463 F.2d at 97. It went on to state, "We cannot view as clearly erroneous the trial court's finding that the appellant gave his testimony in a civil case with realization of the risk involved and of his Fifth Amendment privilege." Id. With due

respect to that court and to the District Court, petitioner asserts that any such "finding" on the basis of the record before the District Court would be clearly erroneous as a matter of law.

The record discloses several facts pertinent to petitioner's assertion of non-waiver. First, it is evident from the record that the civil suit concerned an investment of $740,000 no part of which was the $50,000 involved in the note and order to pay alleged in the criminal prosecution to have been forged by petitioner. It is also evident from the record that no criminal proceedings against the petitioner were pending at the time of the deposition. Furthermore, petitioner specifically swore in an affidavit to the District Court accompanying his Traverse of Respondent's Return and Amended Return that at the time of the deposition "...I

had no knowledge that any criminal prosecution was contemplated in connection with the transactions between myself and Mrs. Geddes." He further swore in the same affidavit that the civil action "was not in any way justified." These assertions were never contradicted by the state in any way in either the state or federal habeas proceedings.

The facts related as being evident from the record and as uncontradicted testimony on affidavit raise, petitioner contends, serious questions of fact pertaining to his assertions of non-waiver, and should have required an evidentiary hearing at some point, as was urged before the Court of Appeals. (Brief of Appellant at 1). The Court of Appeals for the Ninth Circuit has itself held that where a habeas corpus petitioner alleges facts which if true would entitle him to relief and no

hearing has been held in the state courts, it is error to deny the petition without a hearing. McHenry v. Wilson, 403 F.2d 711 (9th Cir. 1968); Pendleton v. Nelson, 404 F.2d 1074 (9th Cir 1968); see Valdez v. People of the State of California, 439 F.2d 1405 (9th Cir 1971). Since no evidentiary hearing was held either in the state habeas proceedings or before the District Court, the District Court apparently held the view, approved by the Court of Appeals, that petitioner's claims involved only questions of law. 28 USC §§ 2243, 2254; see Townsend v. Sain, 372 U.S. 293, 9 L.Ed.2d 770, 83 S.Ct. 745 (1962); Cf. Smith v. Yeager, 393 U.S 122, 21 L.Ed.2d 246, 89 S.Ct. 277 (1968); Harris v. Nelson, 394 U.S. 286, 22 L.Ed. 281, 89 S.Ct. 1082 (1969).

Under these circumstances, the finding of voluntariness upheld by the Court of Appeals amounts to an assertion that as

a matter of law any time a civil action is brought against a defendant which incorporates allegations that might also comprise the elements of a crime, the mere filing of the action puts the defendant on notice of possible self-incrimination, regardless of the actual pendency of criminal proceedings, no matter how frivolous the civil suit or how tenuous the relationship between the civil action and any criminal prosecution which might arise, and regardless of the actual apprehension of the defendant with respect to the possibility of criminal prosecution, possibly with the proviso that the defendant have counsel in the civil matter. (It should be noted that the fact that petitioner had counsel in the civil suit and did not object to the deposition on Fifth Amendment grounds could as easily indicate the frivolous nature of the civil suit as knowing waiver of rights.)

As was mentioned above, the District Court took as authority for this position United States v. Wolfson, 204 F.Supp. 267 (D. Del 1968). Petitioner respectfully asserts that Wolfson does not stand for so broad a proposition as the District Court asserted here, and that it is dubious authority for what it does assert.

In Wolfson, the defendants were indicted for conspiracy to violate the mail fraud statutes and twenty-eight substantive violations of that statute. The part of the opinion cited concerned a ruling against motions to dismiss the indictments based in part upon the ground that depositions taken in civil actions pending in State Court or information obtained therefrom were possibly supplied to the grand jury which returned the indictments. The court stated that the motions were based on conjecture as there

was no record of the nature of the depositions taken, whether the disclosures made therein were in fact incriminating, or whether the depositions or information taken therefrom were laid before the grand jury. Having thus concluded that the allegations of the defendants were entirely based on speculation, the court nevertheless ruled that assuming the state depositions were used as asserted the defendants could have and should have invoked their privilege at the time of the depositions if they were reasonably apprehensive that their disclosures might subsequently incriminate them. 294 F.Supp. at 273.

Since the court also ruled that the use by a grand jury of illegal or tainted evidence does not in any case afford a basis for dismissal of an indictment, (Ibid) its statements about waiver of Fifth

Amendment privileges could be dismissed as dictum. There are however further reasons why Wolfson should not be taken to show waiver here. The court in saying that the defendants could have and should have claimed their privilege at the depositions cites as authority cases in which the courts ruled that the privilege was applicable where the defendant claimed it. They did not discuss waiver at all. Thus the court seems to be saying that the fact that a defendant could have claimed his privilege is reason enough to find that he should have or be deemed to have waived it. This is an absurd proposition when one considers that this court in Miranda, supra., was so concerned with the requirement that a waiver of a right so basic as the right to silence (See Malloy v. Hogan, 378 U.S. 1, 12 L.Ed.2d 653, 84 S.Ct. 1489 (1964)) be a knowing one, that it stated that no claim

of waiver by a defendant interrogated in custody would be countenanced absent a clear showing that the defendant was informed of this right. Miranda, supra, at 467-9, 16 L.Ed.2d at 720. United States v. Kordel, 397 U.S. 1, 25 L.Ed.2d 1, 90 S.Ct. 763 (1970) is instructive in this regard. There the defendant was served with interrogatories in a civil condemnation proceeding under the Federal Food, Drug and Cosmetic Act. (21 USC §§ 301 et. seq) Before the interrogatories were answered the government sent the defendant the statutorily required (21 USC §§ 305) notice that criminal proceedings were contemplated, and such proceedings were subsequently brought. The defendant objected to the answering of the interrogatories until after the disposition of any criminal proceedings on grounds of equity, no mention having been made of the Fifth Amendment. After

defendant's motion for stay of civil proceedings or extension of time to answer was denied, he answered the interrogatories. He then moved to suppress the use of his answers in the criminal prosecution. This motion was denied and the defendant was convicted. The Court of Appeals for the Sixth Circuit reversed, finding that the use of the interrogatories violated the defendant's Fifth Amendment privilege. The Supreme Court reversed this finding. In so doing, however, the Court, per Stewart, J. noted that, "We do not deal here with a case where the Government....has failed to advise the defendant in its civil proceedings that it contemplates his criminal prosecution..." Id. at 11-12, 25 L.Ed.2d at 10. Thus the court clearly indicated no weakening in the consistent constitutional requirement of a knowing waiver of constitutional rights.

Thus, the only way that the dictum of the court in Wolfson can be squared with the requirement of a knowing waiver is if the reasonable apprehension of incrimination spoken of is taken to be a question of fact. In the present case petitioner respectfully asserts that there is no ground for finding that he was or should have been "reasonably apprehensive" of the danger of self-incrimination when faced with a deposition in an unrelated and patently frivolous civil action at a time when no criminal charges were pending against him.

The decision of the Court of Appeals in this case is the only federal appellate case that could be found which rules directly on this important question of federal constitutional law. It appears to be manifestly in conflict with the decisions of this Court requiring that a

waiver of the Fifth Amendment right to silence be a knowing one, Johnson v. Zerbst, supra; Miranda v. Arizona, supra. It imposes on defendants in civil cases the impossible burden of anticipating criminal prosecution on pain of waiver of their Fifth Amendment right to silence in situations in which such prosecution is speculative at best. It opens an area for the abusive misuse by prosecutors of civil testimony, thus importing as well a great deal of uncertainty into the conduct of civil ligation. The authoritative view of this Court is necessary to prevent the occurrence of such eventualities.

B. Introduction of petitioner's civil deposition unconstitutionally forced him to choose between his Fifth Amendment right to silence and his Fourteenth Amendment right not to be deprived of property without due process.

Petitioner asserts that even if there were some merit to the finding of the Court of Appeals that petitioner "could not have been blithely innocent of possible criminal involvement," 463 F.2d at 97, the introduction of his civil deposition in the circumstances of this case violated petitioner's Fifth Amendment privilege against self-incrimination.

In Garrity v. New Jersey, 385 U.S. 493 17 L.Ed.2d 562, 87 S.Ct. 616 (1967) this court held that a police officer could not be forced to incriminate himself on pain of losing his means of employment. Such a choice would necessarily be coercive, and testimony elicited from the police officer at a departmental hearing at which failure to answer would have meant discharge from the force could not be introduced against him at a subsequent criminal trial consistent with the Fifth Amendment. See Spevack v. Klein, 385 U.S. 511, 17 L.Ed.2d 574, 88 S.Ct. 1229 (1967).

Petitioner's case is even stronger for the inadmissibility of his testimony on deposition. The deposition was taken in conjunction with a $740,000 civil action filed against him. The Fourteenth Amendment guaranteed him the right to due process in the protection of that property. Cf. Fuentes v. Shevin, ____ U.S. ____, 32 L.Ed.2d 556, 92 S.Ct. ___ (1972). This right to due process, however, was seriously impinged by the possibility that if he did fully defend himself against what he considered to be a baseless lawsuit, he might thereby incriminate himself. The failure to answer, on the other hand, might put him in serious jeopardy of losing the civil suit. Washington Court Rule, of Pleading, Practice, and Procedure 37 (RPPP 37), since adopted as Civil Rule of Superior Court 37 (CR 37) provides the sanction of contempt of court for a

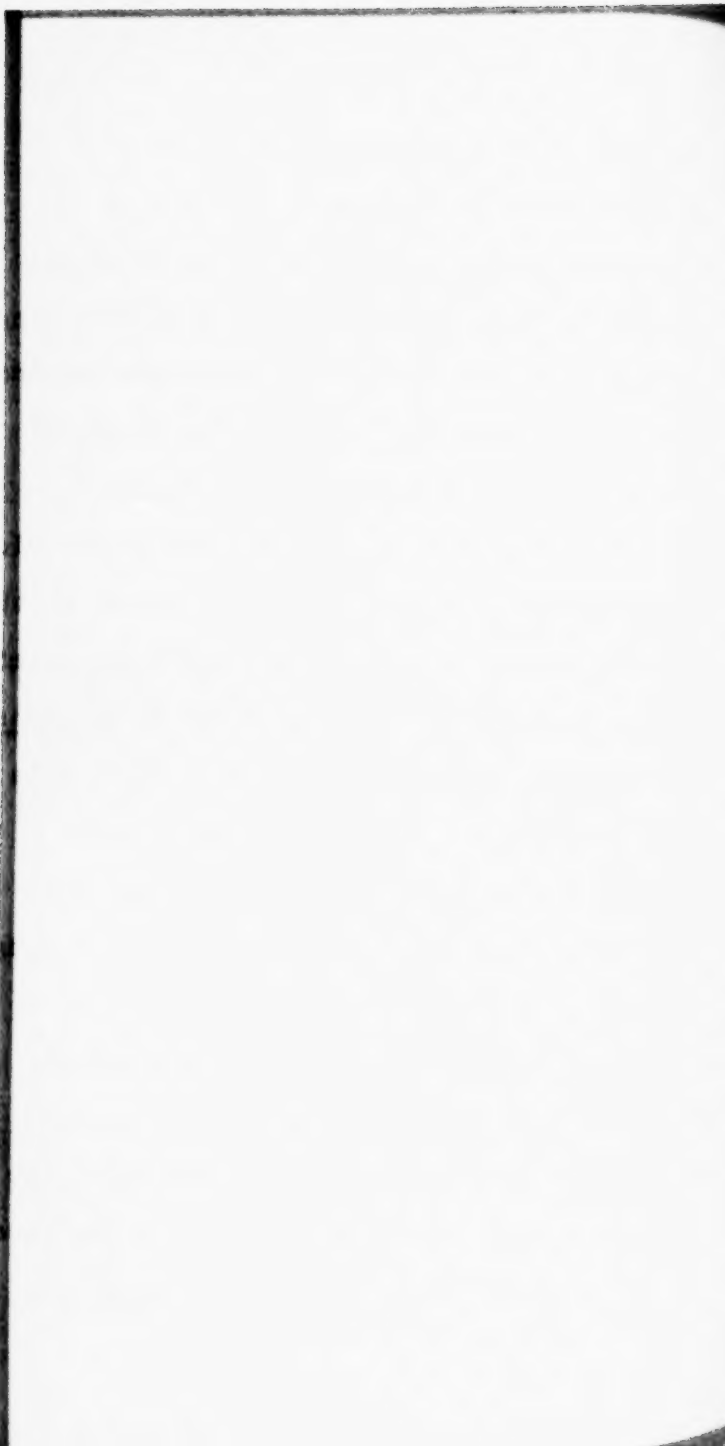
deponent's refusal to answer a civil deposition without substantial justification. And in Mitchell v. Watson, 58 Wm.2d 206, 361 P.2d 744 (1961), the Supreme Court of Washington held that on refusal of a defendant to answer interrogatories, the trial court could presume and infer, as a matter of law, that the evidence withheld would, if produced, contradict the defendant's contentions and support those of the plaintiff. It is not at all certain that in March of 1966 defendant's privilege against self-incrimination would have been considered "substantial justification" (RPPP 37) especially since at that time there were no criminal prosecutions pending at the time, and none were ever brought in Washington.

We thus have the situation of a defendant forced into a choice between the enforcement of his rights under the Fifth

Amendment and those given by the Fourteenth Amendment. The type of coercion implicit in this choice forbids the use in a criminal trial of the testimony received as its result. Simmons v. U.S., 390 U.S. 337, 19 L.Ed.2d 1247, 88 S.Ct. 967 (1968). (See United States v. Kordel, supra. The Court stated: "The Court of Appeals was correct in stating that 'the Government may not use evidence against a defendnat in a criminal case which has been coerced from him under penalty of giving the evidence or suffering a forfeiture of his property'." Id. at 13, 25 L.Ed.2d at 11 (citing 407 F.2d at 575-576).)

The cases cited by the Court of Appeals do not compel a contrary result. In Melson v. Sard, 402 F.2d 653 (D.C. Cir. 1968) a parole revocation hearing was held because of a criminal indictment filed against the parolee. The parolee filed a suit to enjoin the hearing pending the

outcome of the criminal trial, on the grounds that if he didn't testify at the hearing his parole would be revoked, and if he did, he might give incriminating testimony which would be admissible against him in the criminal trial. The Court of Appeals there, recognizing the dilemma the defendant was in, denied the injunction but ordered that any testimony given at the hearing would be inadmissible at the criminal trial, largely on the authority of Simmons and Garrity. 402 F.2d at 655. Thus this case supports petitioner's contention precisely, as does DeVita v. Sills, 422 F.2d 1172 (3rd Cir. 1970), in which a judge facing both disbarment proceedings and a criminal indictment was granted immunity from the use of testimony he gave at the disbarment proceedings, thus removing the burden of the choice which petitioner faced at his deposition. See U.S. v. Fratello,



44 FRD 444 (S.D. N.Y. 1968).

Nor is United States v. Kordel, 397 U.S. 1, 25 L.Ed. 1, 90 S.Ct. 763 (1970), dispositive of petitioner's claim of coercive choice. As the Court of Appeals pointed out the Supreme Court in that case merely "suggested" that a protective order under Fed.R.Civ.P. 30(b) might be the appropriate relief for a defendant faced with civil discovery the answers to which might be self-incriminating 463 F.2d at 98. Furthermore, the Court in Kordel went on to say that "we need not decide this troublesome question." Kordel, supra, at 9, 25 L.Ed.2d at 9.

Exactly how troublesome a question this is was discussed in the remaining case cited by the Court of Appeals, Gordon v. F.D.I.C., 427 F.2d 578 (D.C. Cir. 1970). There, the Court was reviewing a district court decision which granted summary judgment against a defendant who refused

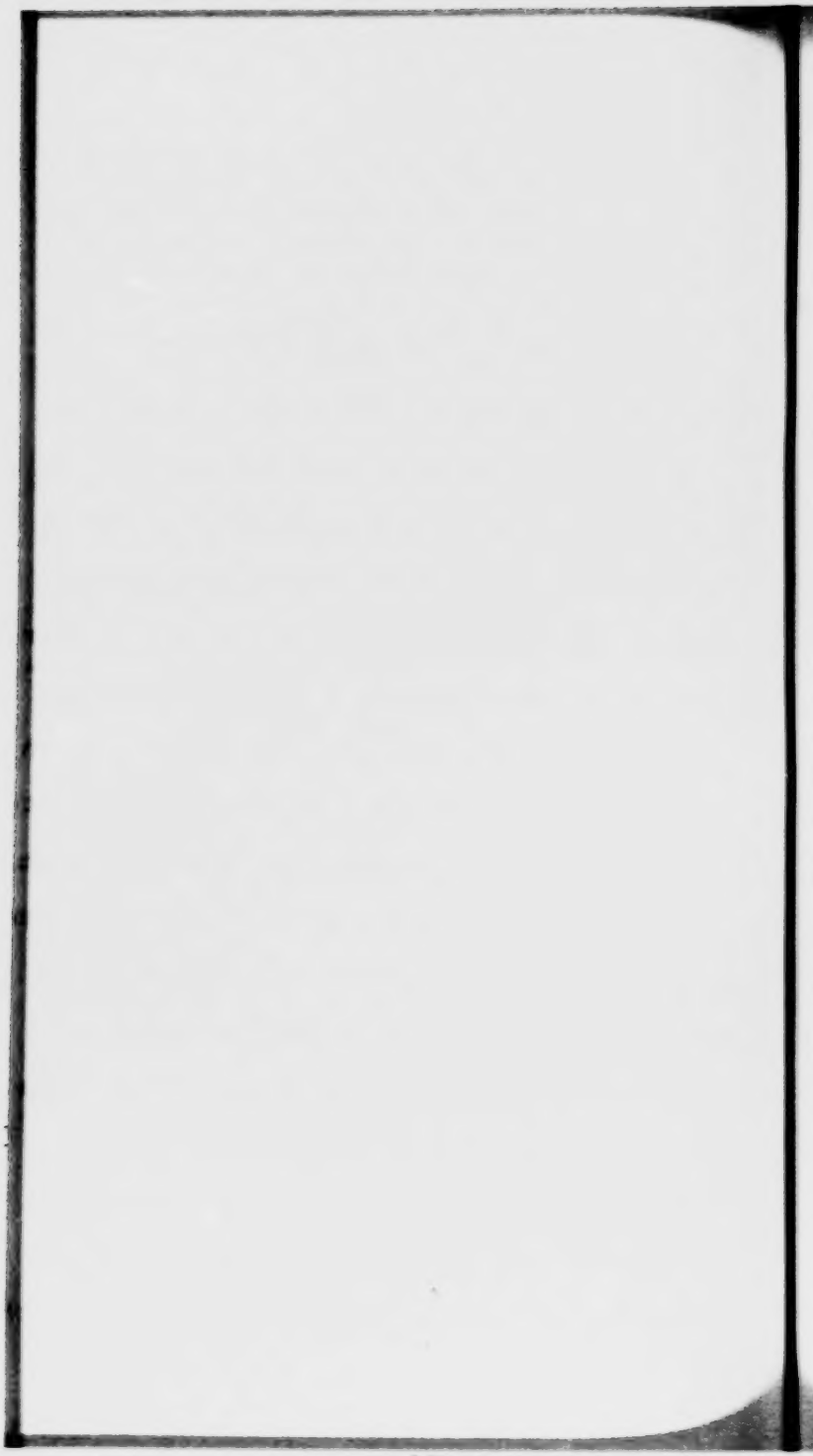
to answer civil discovery on Fifth Amendment grounds. 427 F.2d at 579. This shows clearly the worst fears of a defendant in petitioner's position. The Court in Gordon remanded the summary judgment order for reconsideration of appropriate sanctions, but recognized throughout its opinion the difficult balancing which must be undertaken between the Fifth Amendment rights of the defendant and the interests of his opponent in the civil case.

Under these circumstances, it is not clear that RPPP 30(b) (then the state analog to Fed.R. Civ.P. 30(b)) is a full answer to the Hobson's choice in which petitioner found himself. Though it may now be true that it is the state of the law that

> There may be cases where the requirement that a criminal defendant participate in a civil

> action, at peril of some portion of his worldly goods, violates concepts of elementary fairness in view of the defendant's position in an inter-related criminal prosecution. Gordon, supra. at 580 (See also deAntonic v. Solomon 42 FRD 320 (D.Mass. 1967)),

it is certainly far from clear that the defendant would have been adequately protected by filing for a 30(b) order in a Washington court in 1966. See United States v. Fernandez, 424 F.2d 1291 (5 Cir. 1970), which presents a striking analogy to the circumstances of this case. In this connection, it is also interesting to note that in Mitchell v. Watson, supra., in which severe penalties were placed on a defendant for failure to answer civil discovery in a libel suit, the defendant's refusal appears to have been based (although this is not clear from the record) on his privilege as a reporter under the First Amendment to protect his sources. (Such a privilege was at least arguable until the



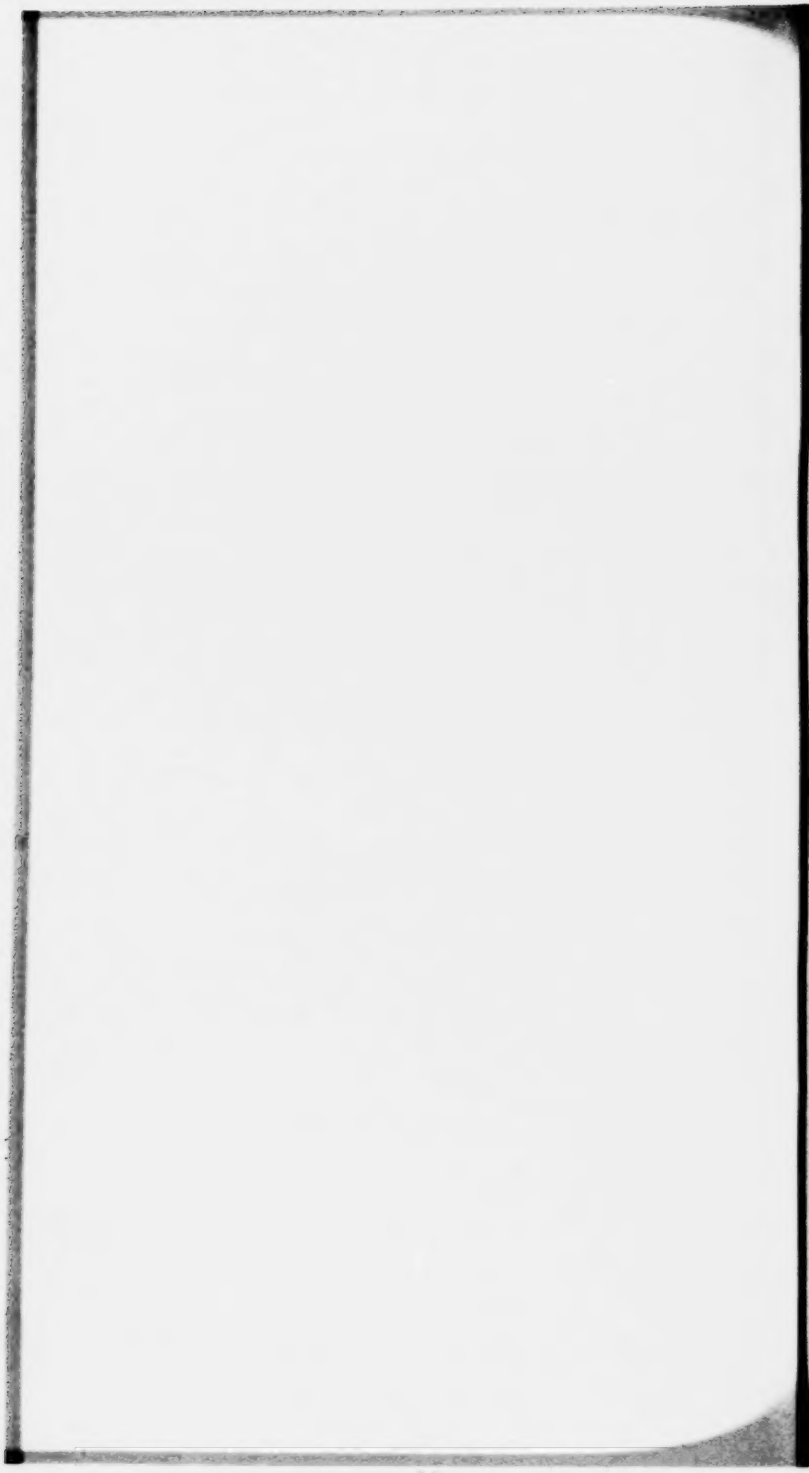
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recent decision of this court in Branzburg v. Hayes, ____ U.S. ____, 33 L.Ed.2d 626, 92 S.Ct. ____, (1972)).

Finally petitioner is again constrained to assert that the whole process of determining after the fact either what petitioner could have done to protect his Fifth Amendment privilege or how a Washington court might have penalized it in 1966 is only made necessary by the Court of Appeals' baseless finding that petitioner "could not have been blithely innocent of possible criminal involvement." 463 F.2d at 97.

3. Impeachment of Petitioner's testimony on civil deposition by the use of false testimony violated his constitutional rights under the Fifth and Fourteenth Amendments.

As expressed above, petitioner feels that the introduction of the deposition in question was error of constitutional

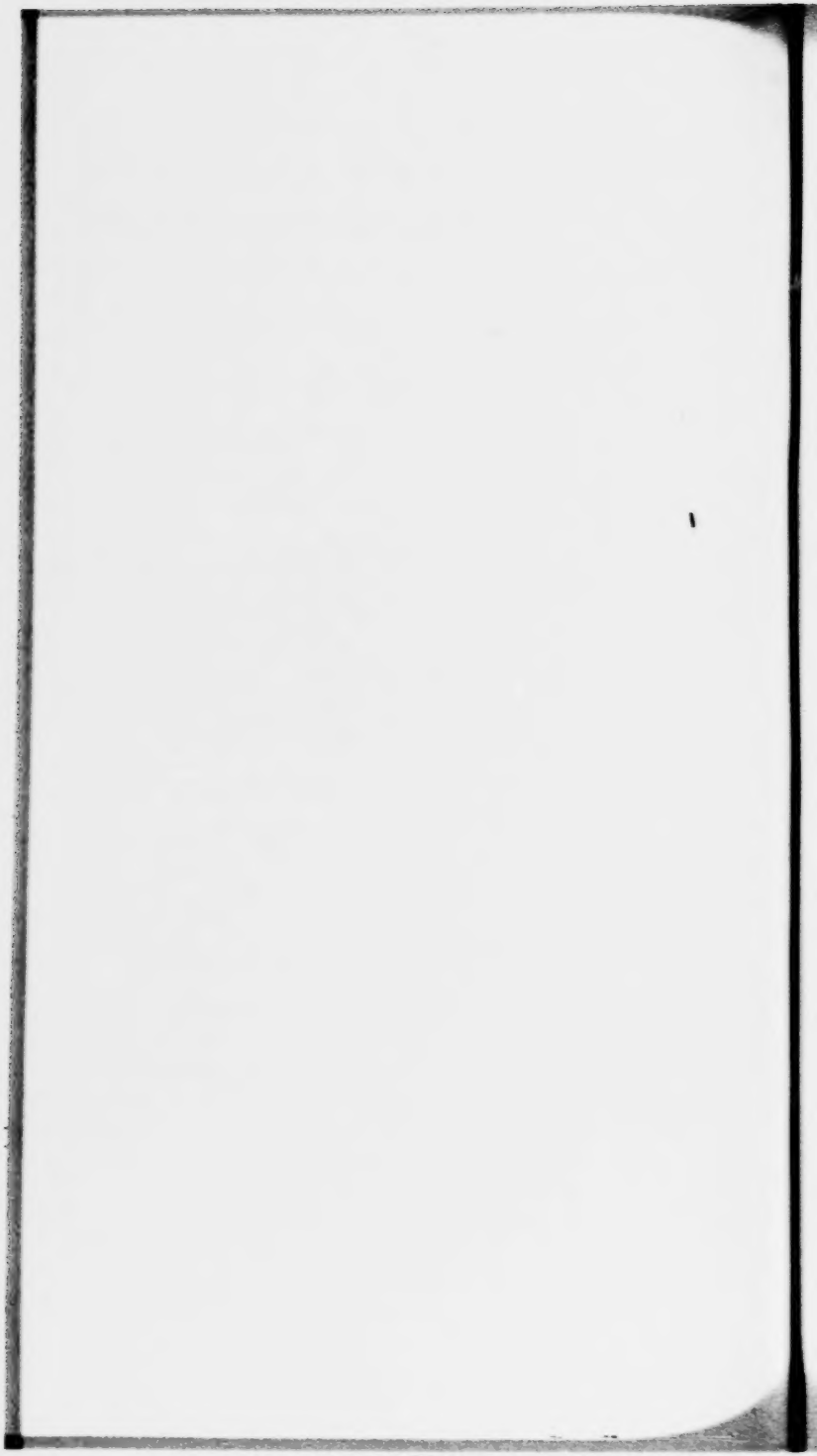


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proportions. This error is compounded by the way in which the prosecution used the deposition.

The deposition was introduced directly following the testimony of Police Inspector Vincent Granburg, the officer in charge of the investigation which resulted in the indictments against petitioner. He testified, in direct contradiction to petitioner's deposition testimony, (RA 178) that petitioner had not given him a handwriting sample when asked to do so. (RT 172) In fact, petitioner had done so, as was asserted in his Traverse filed in the District Court, (RA 75; copy of handwriting exemplar witnessed by Granburg included as Exhibit 10, RA 113-114).

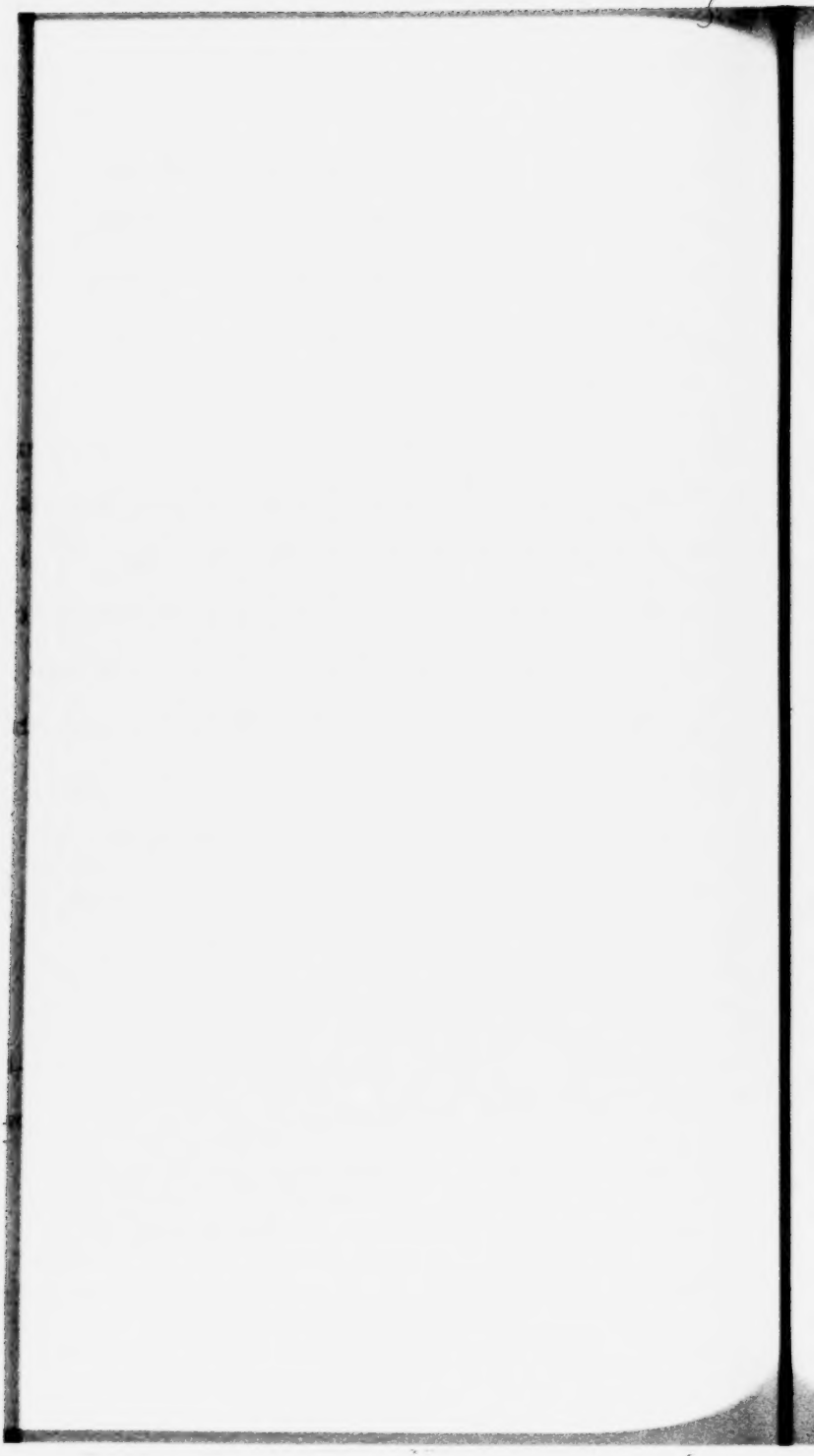
The effect of this was to put petitioner's testimony that he had given the exemplar before the jury (though he



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had claimed his privilege and did not testify), and then to apparently show by Inspector Granburg's testimony that petitioner had lied under oath at the deposition.

The strain this places on petitioner's right to silence is obvious. Since he did not at the time of trial have a copy of the exemplar, the only way he could attempt to rehabilitate his deposition testimony was to waive his right to silence by taking the stand. He was thus "penalized" for his assertion of his right to silence by the impeachment of his credibility by false testimony. See Griffin v. California, 380 U.S. 69, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965). Even if it could be said with assurance that the prosecution did not know of the falsity of Inspector Granburg's testimony, the prejudice caused the defendant in this case again points up the constitutional infirmity of allowing the



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introduction in the prosecution's case-in-chief of a defendant's statements taken at a time when no criminal proceedings were reasonably contemplated. The danger of the prosecution's distortion or illegal impeachment of such prior statements by testimony which the defendant cannot rebut without sacrificing his privileged silence is both great and unwarranted.

Finally, petitioner's contention in his Traverse filed in the District Court that the prosecution "well knew" Granburg's testimony was false was never met by the prosecutor, and in and of itself should have been sufficient to require an evidentiary hearing on this issue. McHenry v. Wilson, supra; Pendleton v. Nelson, supra; Wright v. Dickson, supra. This contention is further bolstered by Granburg's testimony itself. Rather than a statement that he could not locate an exemplar or didn't remember it, he related

that petitioner started to give one then changed his mind, saying that he wanted to talk to his lawyer. (RA 171-2) This testimony, which might be taken to show consciousness of guilt, is extremely damaging, and in light of the actual existence of a handwriting exemplar it is at least strongly possible that it is purposely false. Under these circumstances, Miller v. Pate, 386 U.S. 1, 17 L.Ed.2d 690 (1967) and Napue v. Illinois, 360 U.S. 264, 3 L.Ed.2d 1217, 79 S.Ct. 1173 (1959) clearly mark the introduction of the deposition as constitutionally infirm.

Though not urged as a separate ground below, petitioner's allegations of purposely false testimony were before both courts through both his pro se Traverse (RA 75) and the copy of the exemplar appended thereto (RA 113-14). Under these circumstances it was error to fail to hold an evidentiary hearing, and in absence of

such a hearing error to deny the writ sought. McHenry v. Wilson, supra; Pendleton v. Nelson, supra; Wright v. Dickson, supra.

CONCLUSION

For the reasons stated hereinabove, and in light of the serious questions of Federal Constitutional law involved it is respectfully urged that a writ of certiorari issue to review the decision of the Court below.

Dated: February 5, 1973

Seattle, Washington

Respectfully submitted,

Michael Rosen
Counsel of Record

(Appendices "A" & "B" follow.)

APPENDIX "A"

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

July 10, 1972

JOHN ALLAN LONDON,)
)
Plaintiff-Appellant,) No. 26466
)
vs.)
)
L. N. PATTERSON, Superintendent, DEUEL VOCATIONAL INSTITUTION,)
)
Defendant-Appellee.)

Before: KOELSCH, TRASK and GOODWIN, Circuit Judges.

TRASK, Circuit Judge:

This appeal is from the denial of petitioner's request for a writ of habeas corpus, without an evidentiary hearing. The district court had jurisdiction under 28 U.S.C. § 2241, this court's jurisdiction on appeal is pursuant to 28 U.S.C. § 2253, a certificate of probable cause having

issued from the district court.

In 1964, petitioner, John London, was financial advisor to Mrs. Muriel T. Geddes. As a result of this relationship, on March 7, 1966, Mrs. Geddes filed suit against London in Superior Court for the State of Washington, alleging that London had obtained $740,000 from her: (1) as a cash loan which had not been repaid; (2) under a scheme to defraud her; or (3) under the guise of performing legal services, which he was not licensed to do. She prayed for a judgment against London for $740,000 plus six percent interest, and taxable costs.

Pursuant to pre-trial discovery procedures, London's deposition was taken on March 24, 1966, during which he testified that he did not have Mrs. Geddes sign various documents, that he did not sign them for her, and that he had given a handwriting exemplar to the police. We do not know

the outcome of that action.

On June 15, 1966, London was indicted on two counts of forgery, Cal. Penal Code § 470, and one count of grand theft, Cal. Penal Code § 484, arising out of a transaction which was at least part of the subject matter of Mrs. Geddes' civil suit against him. On London's advice, Mrs. Geddes had invested in Holiday Lodge, Reno, Nevada. The lodge got into serious financial difficulty, and in order to "save" Mrs. Geddes' investment, London arranged a $50,000 loan from Concord National Bank to Metro-Urban Corporation to be guaranteed by Mrs. Geddes' $50,000 note, which London was accused of forging.

London's first trial on the criminal charges ended in October 1966, with a hung jury. A second trial was held in December 1966. At this trial, the prosecution read to the jury portions of the deposition London had given in the civil action

brought by Mrs. Geddes. No objection was made to the use of the deposition as evidence.

Petitioner was convicted on May 8, 1967, the proceedings having been suspended under Cal. Penal Code § 1203.03 to place petitioner in a diagnostic facility for observation. He was sentenced to state prison for the term prescribed by law, and is currently on probation.

London's conviction was affirmed on September 27, 1968, by the Court of Appeal, First Appellate District, where he contended only that the instructions given at the trial were erroneous. He filed a petition for hearing with the California Supreme Court on the same ground which was denied on November 20, 1968. On November 29, 1968, petitioner filed a petition for writ of habeas corpus with the California Supreme Court raising for the first time the issue presented in his federal habeas petition; it was denied.

On March 6, 1969, petitioner filed his request for a writ of habeas corpus in federal district court. London contends that he was denied due process because the prosecution, during its case in chief, read to the jury portions of the deposition petitioner had made in the civil action brought by Mrs. Geddes. At the time of the deposition, petitioner asserts, he was aware of no criminal action pending against him nor of the possibility of any such action.

The first issue brought to this court by petitioner is whether the statements he made during his deposition in the civil action could be admitted in the later criminal trial, where he did not take the stand, without violating his Fifth Amendment privilege against self-incrimination.

(1) Some prior statements of a criminal defendant may be used even though he does not

take the stand in his own behalf. His confessions, when shown to have been voluntarily made, are admissible against him even though he does not become a witness, and this does not violate his Fifth Amendment rights. Harrison v. United States, 392 U.S. 219, 88 S.Ct. 2008, 20 L. Ed. 2d 1047 (1968); United States v. Hughes, 411 F. 2d 461, 466 (2nd Cir.), cert. denied, 396 U.S. 867, 90 S.Ct. 145, 24 L. Ed. 2d 120 (1969). Likewise, former testimony, voluntarily given in a criminal trial, may be introduced in a later trial upon remand. Edmonds v.United States, 106 U.S. App. D.C. 373, 273 F. 2d. 108 (1959), cert. denied, 362 U.S. 977, 80 S.Ct. 1062, 4 L. Ed. 2d. 1012 (1960).

Appellant readily distinguishes these two situations, because in each the defendant is fully aware of the criminal prosecution imminently probable or in progress when he speaks It is

therefore "an intentional relinquishment or abandonment of a known right or privilege. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L. Ed. 1461 (1938). Appellant places great emphasis upon the argument that at the time his deposition was taken in the civil case, there was "no reason whatever to apprehend any possibility of incrimination " Therefore, appellant continues, his innocent answering of questions could not have amounted to waiver.

(2) Paragraph II of the complaint in the civil action provided in pertinent part that:

> "(D)efendant husband (London) obtained from plaintiff (Geddes) various sums from time to time totaling $740,000. The funds ...were obtained from plaintiff under a scheme to cheat, defraud and unlawfully deprive plaintiff of her said funds, or were obtained from her in the guise of perform-

ing legal services for her and giving her legal advice, all at a time when defendant husband was not licensed to practice law..."

Under such allegations, assuming the usual state criminal code, London could well have anticipated a possible criminal charge of obtaining money under false pretenses, larceny, criminal fraud or extortion. He was represented by counsel at the deposition where this questioning took place, and appropriate objection could have been made. One being sued civilly for $740,000 upon charges of such a nature, and having retained counsel, could not have been blithely innocent of possible criminal involvement. We cannot view as clearly erroneous the trial court's finding that the appellant gave his testimony in the civil case with realization of the risk involved and of his Fifth Amendment privilege.

Appellant alternatively argues that his de-

posed testimony was not admissible in the criminal action because an impermissible burden was placed upon him when he was questioned in the civil discovery proceeding. If he failed to answer and defend against the civil action, he stood to have judgment taken against him for $740,000. If he did testify, his answers could be termed voluntary and used against him in a criminal proceeding, even though he would then seek to rely upon his privilege against compulsory self-incrimination.

In support of his theory of an impermissible coercive choice, appellant relies on Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L. Ed. 2d 562 (1967), and upon its companion case of Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L. Ed. 2d 574 (1967) In the first, police officers who were questioned during a state investigation of traffic-ticket fixings were warned that what they said could be used against them, that

they had a privilege to refuse to answer incriminating questions, and that refusal to answer would subject them to possible removal from the force. The police officers answered and their responses were subsequently used, over objection, in criminal prosecutions for conspiracy to obstruct the administration of traffic laws. The Court held that these statements could not be used, as they were involuntary as a matter of fact and law. That the police officers were put to the "coercive choice," between answering the questions which tended to incriminate them and losing their jobs if they exercised their privilege, vitiated their waiver. The test the Court enunciated was whether the accused "was deprived of his 'free choice to admit, to deny or to refuse to answer .'" 385 U.S. at 496, 87 S.Ct. at 618.

In the companion case of Spevack v. Klein, supra, the Court held that a lawyer could not be

disbarred because he refused to produce financial records or to testify at a judicial inquiry into his fitness for the practice of law. The threat of disbarment and loss of professional standing, professional reputation and livelihood created an unconstitutional compulsion for the lawyer to give up his Fifth Amendment rights. See Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 1913, 20 L. Ed. 2d 1082 (1968); Simmons v. United States, 390 U S. 377, 88 S.Ct. 967, 19 L. Ed. 2d 1247 (1968).

The exact basis for the defendant's contention that his deposition testimony was involuntary is not entirely clear, but the cases relied upon would indicate his argument to be the coercion involved in the choices offered to him: (1) He would testify voluntarily, but run the risk that his answers would be used against him on the basis that he had waived his Fifth Amendment

privilege; or (2) He could refuse to answer and run the risk of a large judgment against him because of his refusal. Such coercive alternatives, appellant contends, are constitutionally impermissible.

In United States v. Kordel, 397 U.S. 1, 8-9, 90 S.Ct. 763, 25 L. Ed. 2d 1 (1970), another alternative was suggested. This was to seek relief by means of a protective order under Fed. R. Civ. P. 30 (b) postponing civil discovery until termination of the criminal action. Although Kordel was decided after the deposition and criminal trial here, the protective provisions of Rule 30 (b) have been on the books for a long time See also Gordon v. Federal Deposit Ins. Corp. 138 U.S. App. D.C. 308, 427 F.2d 578 (1970); DeVita v. Sills, 422 F. 2d 1172 (3rd Cir. 1970); Melson v. Sard, 131 U.S. App. D.C.102, 404 F. 2d 653 (1968).

No effort was made here to obtain relief either at the deposition where appellant was represented by counsel, or at the criminal trial where he was also represented by counsel. In view of our concurrence with the trial court that the deposition testimony was voluntary, and thus, there was no Fifth Amendment violation, it is not necessary to consider the deliberate bypass issue.

Judgment affirmed.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOHN LONDON, Petitioner, vs. L. N. PATTERSON, Respondent.	)	No. 50953 Dated May 1, 1970

ORDER

Before: W. O. SWEIGERT, District Judge

This is a petition for a writ of habeas corpus filed herein under the provisions of 28 U.S.C. § 2241 by John London, now on parole under the commitment of the Contra Costa Superior Court made on May 8, 1967, sentencing petitioner for the term prescribed by law for the crimes of forgery, California Penal Code § 479, and grand theft, California Penal Code § 484.

The case is before the court on the petition, respondent's return including exhibits,

and petitioner's traverse also including exhibits.

Petitioner essentially contends that he was' denied his Fifth Amendment privilege against compulsory self-incrimination.

In support of his contention petitioner alleges, in substance, that the prosecution introduced into evidence in the petitioner's criminal trial portions of a deposition of the petitioner taken in a prior civil trial and that petitioner refused to take the stand in the criminal proceedings

Therefore, petitioner presents the question whether a defendant's deposition taken in a civil proceeding may be introduced into evidence in a later criminal proceeding in which the defendant exercises his right to refuse to take the witness stand.

We find that petitioner's claim is without merit.

The Fifth Amendment privilege against self-incrimination is one which protects an individual's right not to be compelled to give evidence against himself.

It is clear that when any prior statement of a defendant is introduced into evidence in a criminal proceeding, assuming the statement was voluntarily given, the defendant is not being compelled to give evidence against himself.

In this case petitioner voluntarily testified in the deposition in his civil case and it is clear from the record that he was represented by counsel at the time of such deposition

If the petitioner desired to raise his Fifth Amendment privilege the time to do so was at his deposition, not on a writ of habeas corpus following a criminal conviction. United States v Wolfson, 204 Fed. Supp. 267, 273 (D. Del. 1968)

Although there may be some question as to

whether the introduction of the deposition evidence met the requirements of the California rules of evidence, such a failure would not raise a substantial federal question.

Moreover, there is a substantial question raised by the respondent concerning petitioner's failure to object to the introduction of the deposition evidence at the trial. It would appear that petitioner is bound by a deliberate by-pass of state remedies as a choice of trial strategy or tactics; Henry v. Mississippi, 379 U.S. 443 (1965); Nelson v. People of the State of California, 346 F 2d 73 (9th Cir. 1965); Wilson v. Gray, 345 F. 2d 282 (9th Circ. 1965). However, we need not reach that question in view of our finding that petitioner's contention fails to raise a substantial federal question.

Accordingly, it is the order of this court that the petition for a writ of habeas corpus should

be, and the same is, hereby denied

Dated: May 1, 1970.

W. O. SWEIGERT
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN LONDON, Petitioner, vs. L. N. PATTERSON, Superintendent, Deuel Vocational Institution, Respondent.	)	NO. 26, 466 Dated October 12, 1972

ORDER

Before: KOELSCH, TRASK and GOODWIN, Circuit Judges

The panel as constituted in the above case has voted to reject the petition for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing en banc is rejected.